NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 44 | Issue 1 Article 9

January 2000

PUBLIC ACCESS TO NEW YORK AND NEW JERSEY BEACHES: HAS EITER STATE ADEQUATELY FULFILLED ITS RESPONSIBILITIES AS TRUSTEE UNDER THE PUBLIC TRUST DOCTRINE?

Frank Langella

PUBLIC ACCESS TO NEW YORK AND NEW JERSEY BEACHES: HAS EITHER STATE ADEQUATELY FULFILLED ITS RESPONSIBILITIES AS TRUSTEE UNDER THE PUBLIC TRUST DOCTRINE?

I. INTRODUCTION

The focus of this Note concerns the following two issues: 1) whether the Public Trust Doctrine is fully recognized by the courts of New York and New Jersey, and if so 2) whether the courts of both states have been effective or ineffective in utilizing their powers as trustee under the Doctrine to protect and preserve public access to beachfront property.

The thesis for this Note is based on the historical function of the Doctrine, which is to prevent the dissipation of public lands through negligent or improper conversion to private uses.[1] Three principles are central to this Doctrine. First, that certain properties, namely the seas, seashores, and navigable waterways, are owned in common by the public and subject to public rights of ingress and egress.[2] Second, that the form of such ownership has been established as a trust between the state and its citizens.[3] Third, that implicit in the state's fiduciary role as trustee is a presumption that public lands not be disposed of in a manner that substantially impairs the interests of the public.[4]

Under trustee law, the trustee has a duty to the beneficiary of the trust to exercise such care and skill as a person of ordinary prudence would exercise in dealing with his or her own property.[5] The trustee representing the estate must take possession of and protect the property of the estate; preserve, and where prudent, enhance the value of the property; and defend its legal rights and interests.[6] The fact that the trust is a

---

1. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970).

2. *See, e.g.*, 2 THE INSTITUTES OF JUSTINIAN, 65 (J. Thomas trans. 1975); H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968); Illinois Cent. RR. v. Illinois, 146 U.S. 387, 452-53 (1892).

3. *See* sources cited *supra* note 2.

4. *See* sources cited *supra* note 2.

5. *See* Thomas A. Campbell, *The Public Trust, What's it Worth?*, 34 NAT. RESOURCES J. 73, 76 (1994).

6. *See id.*

public one does not allow the government as trustee to remain passive.[7] To the contrary, the government as trustee must protect trust property against loss, dissipation, or diminution and conduct itself with diligence, fairness, and faithfulness.[8] The recognized public uses for trust property include commerce, navigation, fishing, recreation, and preservation of such property in its natural state.[9]

Whether New York and New Jersey have fulfilled their obligations as trustees is brought into sharp focus when examined in the context of beachfront property and its accessibility by the public. It is in this idyllic beachfront setting, among our most treasured natural resources, that a titanic struggle between opposing forces is taking place.[10] It is not the age old struggle between surf and sand but the increasingly frequent and intense collision between two treasured sets of expectancy interests: those of private landowners who expect their titles to land and water to remain secure, and those of the general public, who expects that most of its beaches will remain beaches and open to its access.[11] This conflict has been exacerbated by a change in public values towards our most precious water resources.[12] The use of these resources has now reached critical limits.[13]

The phenomenal growth in coastal area population threatens to continue unabated.[14] Sixty-five (65) percent of the population of the United States lives less than fifty miles from the coast and this already amazingly high percentage is expected to increase to seventy-five (75) percent by the year 2000.[15] The increasing frequency of conflict between the two sets of expectancy interests is directly related to this surge in population

---

7. *See id.* at 77.

8. *See id.*

9. *See id.*

10. *See* discussion *infra* pp. 2-3.

11. *See* James M. Kehoe, *The Next Wave In Public Beach Access: Removal of States as Trustees of The Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1914 (1995).

12. *See* Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 474 (1989).

13. *See id.*

14. *See* Daniel Summerlin, *Improving Public Access to Coastal Beaches: The Effect of Statutory Management and The Public Trust Doctrine*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 425 (1996).

15. *See* Kehoe, *supra* note 11, at 1913 n.2.

growth.[16] As the coastal population increases, so does the desire to own land on or near the coast.[17] As private ownership of coastal land increases, the availability of coastal land for use by the public decreases, setting the stage for increased conflict.[18]

As we will soon discover, New York's decisional law concerning beachfront property evidences a reluctance and, in instances related to private property, an aversion to recognizing and applying fully the terminology and principles of the Public Trust Doctrine.[19] Similarly, New Jersey, despite its self proclaimed activist role in support of the Doctrine and apparent facility to articulate the terminology of the Doctrine, has failed to recognize or apply fully the Doctrine's principles.[20]

At this point, it is appropriate to look at the itinerary for our voyage. Part II starts with Section A, the background and development of the Public Trust Doctrine, beginning from ancient history, continuing through semi-ancient history, and concluding with current history. Our journey continues with Section B, which presents a brief evaluation of the weaknesses and strengths of the Doctrine, and Section C, an equally brief presentation of apparent alternatives to the Doctrine. Section D brings us close to the end of this leg of our voyage by presenting a description of the conflict between private property and public use expectancy interests. Section E concludes Part II, and prepares us for our voyage into deeper water by suggesting a framework for analysis of New York and New Jersey's Public Trust Doctrine jurisprudence.

Parts III and IV take us on the longest, but by no means most tranquil part of our voyage by presenting a careful examination of New York and New Jersey's jurisprudence in applying the Doctrine to access and use of beachfront property. Part V returns us to shore with a conclusion on whether, and to what degree New York and New Jersey's decisional law recognizes the Public Trust Doctrine. In the end, Part VI, despite identifying potential suggestions for improvement, leaves us lying on the beach uncomfortably close to the incoming tide, unsure of how much longer we will be allowed to stay, or whether even the beach itself will be allowed to remain.

---

16. *See* Summerlin, *supra* note 14, at 425.
17. *See id.*
18. *See* Kehoe, *supra* note 11, at 1913.
19. *See* discussion *infra* Part III.
20. *See* discussion *infra* Part IV.

II. THE PUBLIC TRUST DOCTRINE

A. *Background and Development*

1. Ancient History

The Public Trust Doctrine was first expressed in the work of Justinian in his compendium of principles of Roman law,[21] which provided that "by the law of nature these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea."[22] The air, water, sea, and shore were considered *res communes*[23] or "common to all," and were not subject to private ownership.[24] An almost identical view was eventually reflected in the customs of most countries throughout Europe in the Middle Ages.[25]

2. Semi-ancient History

Eventually, the Public Trust Doctrine appeared in the English common law through the writings of Bracton.[26] Under English common law, public trust or sovereignty lands were not simply *res communes*.[27] Title, *jus privatum*,[28] was held by the King, while dominion over the lands, *jus publicum*,[29] was vested in the crown as a trust for the benefit of the public.[30] *Jus Privatum* is the lesser title and concerns the right of the sovereign to alienate trust lands subject to the rights of the public under the *jus*

---

21. *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633-635 (1986).

22. THE INSTITUTES OF JUSTINIAN bk. 2, 65 (J. Thomas trans. 1975).

23. *See id.*

24. *See id.*

25. *See* Lazarus, *supra* note 21, at 635.

26. *See* H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans. 1968).

27. *See* DONNA R. CHRISTIE, COASTAL AND OCEAN MANAGEMENT LAW, 18-19 (1994).

28. *See* BRACTON, *supra* note 26.

29. *See id.*

30. *See* CHRISTIE, *supra* note 27, at 19.

publicum.[31] The *jus publicum* is the dominant title and concerns the right of the public to access and use the trust lands for navigation, commerce, and fishing.[32]

3. Current History

Later, the Public Trust Doctrine was adopted in the United States as part of the English common law.[33] The Doctrine is nearly universally accepted throughout the United States.[34] However, the dual sovereign nature of the United States federal system required that the interests provided under the Doctrine be defined differently for the federal government versus state governments.[35] The federal government's interest focuses on the commerce in interstate navigable waters and is labeled the "federal navigation servitude."[36] The state governments' interest focuses on the bed of navigable waters within each state's border and is labeled "sovereign ownership."[37] The federal government's version of the Public Trust Doctrine was first enunciated by the Supreme Court in 1824 in *Gibbons v. Ogden*,[38] and then repeated in a host of succeeding judicial decisions concerning the scope and magnitude of this federal navigation servitude.[39] In contrast, the state's Public Trust Doctrine, developed differently within each state, suggested that each state had special powers over certain water resources and owed certain duties to the public with respect to these water resources.[40]

In the 1892 landmark public trust case of *Illinois Central Railroad v. Illinois*,[41] the Supreme Court ruled that "lands were held by the state, as they were by the King, in trust for public uses. . . ."[42] The Court was clear and unambiguous in declaring that the public trust obligations im-

31. *See* Summerlin, *supra* note 14, at 428-29.
32. *See id.* at 429.
33. *See* CHRISTIE, *supra* note 27, at 19.
34. *See* Summerlin, *supra* note 14, at 425.
35. *See* Lazarus, *supra* note 21, at 636.
36. *Id.*
37. *Id.*
38. 22 U.S. (9 Wheat.) 1 (1824).
39. *See* Lazarus, *supra* note 21, at 637.
40. *See id.*
41. 146 U.S. 387 (1892).
42. *Id.* at 457.

posed upon the states could not be abandoned by attempting to convey trust properties.[43]

The concept that the Doctrine was akin to a trust, with the sovereign as trustee, arose from this notion of sovereign ownership and duties owed to the public.[44] Through later judicial decisions, this evolved into a principle that declared sovereign-owned lands to be inalienable.[45] Modern jurisprudence has loosened the Doctrine from its traditional moorings of navigation, commerce, and fishing.[46] In addition to these traditional uses have been added contemporary interests including tidelands, navigable waterways other than oceans, and recreational uses.[47] Environmental and ecological protection and preservation are also considered to be within the trust.[48] Basically, the Doctrine states that shorelands, bottomlands, tidelands, tidewaters, navigable freshwater, and the plant and animal life living on or in these waters are owned by the public but held in trust by the state for the benefit of the public.[49] The Doctrine provides the public with lateral access over these lands, such access being limited to that area of the beach below the historical high water mark.[50] However, the historical Doctrine does not provide for perpendicular access across land to the beachfront.[51] In view of the increasing privatization of the coastline, this missing right has resulted in the absurd situation of beaches open to the public but with no way for the public to reach them.[52] This Note will argue that New York and New Jersey's jurisprudence has failed to develop a solution to this dilemma.

---

43. *See id.* at 453.
44. *See* Lazarus, *supra* note 21, at 637.
45. *See id.*
46. *See* Summerlin, *supra* note 14, at 426.
47. *See id.*
48. *See* Sax, *supra* note 12, at 473-74.
49. *See* Summerlin, *supra* note 14, at 426.
50. *See id.* at 425-26.
51. *See id.*
52. *See id.* at 426-27.

B. *Weaknesses and Strengths of the Public Trust Doctrine*

1. Weaknesses

There is little uniformity to the Public Trust Doctrine.[53] Each state has its own version and interpretation based on its views of justice and policy.[54] Some states have interpreted and applied the Doctrine expansively while others have done so narrowly.[55] Interpretation and application of the Doctrine vacillates between an expansive interpretation and application that favors the public welfare to a narrow interpretation and application that favors private interests.[56] For the most part, the Doctrine remains limited in application to the traditional trust purposes of navigation, commerce, and fishing and traditional trust lands[57] including navigable waters, submerged lands, and that part of the shoreline between the high and low watermarks known as the foreshore.[58] This has resulted in inconsistent and confusing rulings and threatens to reduce the Doctrine to an inefficient rule-making system.[59]

2. Strengths

Despite the lack of uniformity throughout the United States, each state's version of the Doctrine is based upon a few central principles.[60] The Doctrine provides that there are two titles vested in public trust lands.[61] The dominant title is known as the *jus publicum* and provides the

53. *See id.* at 428.

54. *See* Shively v. Bowlby, 152 U.S. 1, 18-32 (1893).

55. *See* Summerlin, *supra* note 14, at 426.

56. The variability in judicial interpretation and application of the Public trust Doctrine is examined in greater detail in Parts III and IV of the Note.

57. The limited application of the Public Trust Doctrine to traditional purposes and lands is reflected in New York and New Jersey's jurisprudence as presented in Parts III and IV of the Note.

58. There are at least four terms of art used to distinguish beachfront land: Underwater Land is that land seaward of the low tide mark; Foreshore is that land located between the low and high water marks; Dry Sand Area is that land located between the high water mark and the vegetation line; Upland is that area landward of the vegetation line. *See* Summerlin, *supra* note 14, at 426 n. 6.

59. *See id.* at 430.

60. *See id.* at 428.

61. *See id.*

public with the right to access and use trust property for navigation, commerce, fishing, and other purposes.[62] The lesser title is known as the *jus privatum* and provides the state with the power to develop and sell trust lands subject to the *jus publicum* interest.[63]

Another strength of the Doctrine is that it is a property right specifically aimed at waterfront and coastal issues, not a police power of the state.[64] This allows the Doctrine to be employed to address the exigencies of the coastline and create protective environmental programs.[65] Such action is unavailable under the police power, which in addition to not being tailored to address the specific problems of coastal areas, has traditionally been aimed at restricting harmful activities.[66] Governmental use of the police power is also more likely to violate the Takings Clause[67] than use of the Public Trust Doctrine. This is because the Doctrine is grounded in property and trust law.[68] Accordingly, the government is protected from claims of taking without due process of law as long as the government, in its capacity as trustee, has acted within its rights and has not breached its duty to the beneficiary, the public.[69]

Yet another strength of the Doctrine is that it is based on well established and defined trust law.[70] The trustee, beneficiaries, and purpose of the trust are clear and definite, and the Doctrine is flexible enough to address nearly all issues that arise with respect to the coast.[71] Thus, it is not necessary to continuously legislate to meet changing conditions.[72]

---

62. *See id.* at 428-29.
63. *See id.* at 429.
64. *See id.*
65. *See id.*
66. *See id.*
67. *See* U.S. CONST. amend. V; *see also* Summerlin, *supra* note 14, at 429 n.34.
68. *See* Summerlin, *supra* note 14, at 429.
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.*

C. *Alternatives to the Public Trust Doctrine*

In an attempt to shore-up their approach to dealing with the increasing coastal crisis, states have tried to utilize various alternatives to the Public Trust Doctrine.[73]

1. Public Easements by Prescription

In order to acquire a prescriptive easement, possession must be continuous, uninterrupted, exclusive use that is open and notorious and adverse under claim of right.[74] Most states recognize that continual use of a beach by the public constitutes a prescriptive easement.[75] However, the notion that a prescriptive easement could be acquired by the diverse public, based on seasonal use of the beach that is adverse to the landowners, is at best problematic for exactly these reasons.[76] It is unlikely that all of the of required conditions will be met by so diverse a group as the public.[77]

2. Implied Dedication

Dedication of property to public use, unlike a prescriptive easement, does not necessarily require a specific time period.[78] However, it does depend on intent and can be as problematic as a prescriptive easement.[79] If the implied dedication is by owner acquiescence, it is the owner's intent that matters, not the length of public use.[80] If the implied dedication

---

73. *See* Luise Welby, *Public Access to Private Beaches: A Tidal Necessity*, 6 UCLA J. ENVTL. L. & POLICY 69, 74 (1986).

74. *See* CHRISTIE, *supra* note 27, at 40.

75. *See id.*

76. *See id.*

77. Establishing a prescriptive easement by public use is conceptually problematic because it can be argued that seasonal use by diverse members of the public can never meet the requirements of continuous or exclusive use. Furthermore, private waterfront property owners have also maintained that because it is impossible to bring an action for ejectment or trespass against the general public, the public should not be able to gain rights through prescription. *See id.*

78. *See* CHRISTIE, *supra* note 27, at 42.

79. *See id.*

80. *See id.*

is by adverse use, it is the adverse user's intent that matters.[81] To further muddy the waters, the specific time period of use required to ripen into dedication is not uniformly established.[82] This lack of uniformity also distinguishes implied dedication from a prescriptive easement.[83] Once again, it is unlikely that the required conditions will be met by so diverse a group as the public.

3. Customary Use

Some states have found that a public easement exists to use the beach based on customary use.[84] This doctrine holds that the public may not be excluded from private property that it has customarily used in an uninterrupted fashion from ancient times.[85] However, the application of this doctrine is either too broad or too narrow because of the requirements necessary to establish customary use. The requirements of custom for public use are: public use that is ancient, exercised without interruption, reasonable, peaceable, obligatory, and not repugnant to custom or law.[86] However, as with prescriptive easements and implied dedication, it is unlikely that all of the required conditions will be met by so diverse a group as the public.

4. Eminent Domain

Acquiring access for the public to beachfront property through eminent domain is the alternative most favored by private property owners.[87] However, it is the most expensive method of acquiring public access to the beachfront because such property is so costly.[88]

---

81. *See id.*
82. *See id.* at 44.
83. *See id.*
84. *See id.* at 45; *see also* Gion v. City of Santa Cruz, 2 Cal.3d 29 (1970).
85. *See id.* CHRISTIE, *supra* note 27, at 45.
86. *See id.* at 44 (referring to Blackstone's Commentaries).
87. *See* Summerlin, *supra* note 14, at 436-37.
88. *See id.*

D. *The Inevitable Conflict Between Private Property Rights and the Public Trust Doctrine*

Coastal beaches are a unique and extremely valuable resource.[89] Unfortunately, the fixed supply of coastline and an ever increasing population have created a situation in which many Americans are finding diminishing opportunities to access the beachfront.[90] The tension is only increased by the continued privatization of available waterfront property.[91] When beachfront landowners, through continued waterfront development, can prevent the public from gaining access to the ocean, the ocean itself is effectively converted into private property.[92] This tension has brought into acute focus the issue of public access to the beach versus privately owned beachfront property.[93]

The management of beachfront property is polarized by two diametrically opposed views.[94] On one hand are the general public who favor greater public access to the beach.[95] They advocate a general public right of access to and use of every beach in the country without regard to whether the beachfront property is privately or publicly owned.[96] On the other hand are the private owners of beachfront property.[97] They advocate that general public access to beachfront should be limited only to public beaches.[98] These are not merely opposing opinions or views but competing expectancy interests.[99] Hence, conflict over them is inevitable. However, both of these views are seriously flawed.[100]

On one hand, if the public were to succeed in gaining access to all beaches from every point along the beachfront, such success would come at the expense of violating the Constitutional rights of private property

89. *See* Welby, *supra* note 76, at 70.
90. *See* Kehoe, *supra* note 11, at 1913.
91. *See* Summerlin, *supra* note 14, at 425.
92. *See* Kehoe, *supra* note 11, at 1913.
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
97. *See id.*
98. *See id.* at 1914.
99. *See id.*
100. *See id.*

owners.[101] Even though the Doctrine forbids the alienation of such trust lands in a manner that substantially impairs the interests of the public, the reality is that such conveyances have taken place.[102] If the government sponsored unlimited public access, private property owners would be deprived of their rights without due process of law.[103] Such government sponsored deprivations of private property rights without compensation would constitute a taking.[104]

On the other hand, restricting public use of the beachfront to the current access points and public beaches, especially in view of the near tidal wave increase in the numbers of people flocking to the beach, threatens to deny many the enjoyment that they are entitled to under the Doctrine and increase litigation related to this conflict in expectancy interests.[105]

E. *Framework for Analysis of New York and New Jersey's Public Trust Doctrine Jurisprudence.*

The professed purpose of this Note is to evaluate whether New York and New Jersey, through their respective judicial decisions, have adequately fulfilled their responsibilities as trustees under the Public Trust Doctrine. To this end, it is important to articulate from all of the foregoing the principles that are embodied in the Doctrine:

1. The first principle, public accessibility to trust lands, holds that certain properties, namely the seas, seashores, and navigable waterways are owned in common by the public and thus, subject to public rights of ingress and egress.[106]

2. The second principle, the public trust, holds that the form of such common ownership has been established as a trust between the state and its citizens.[107]

---

101. *See* U.S. CONST. amend. V; *see also* Kehoe, *supra* note 11, at 1914.
102. *See* discussion *infra* pp. 201-203, 208-210, 215-216.
103. *See* U.S. CONST. amend. XIV; *see also* Kehoe, *supra* note 11, at 1914.
104. *See* U.S. CONST. amend. V; *see also* Kehoe, *supra* note 11, at 1914.
105. *See id.* at 1915.
106. *See supra* note 2.
107. *See supra* note 2.

3. The third principle, the inalienability of trust lands, establishes a presumption that the state, in its fiduciary role as trustee, not dispose of public lands in a manner that substantially impairs the interests of the public.[108]

The foregoing framework will be superimposed on the judicial decisions of New York and New Jersey to determine whether they have recognized and relied upon the Doctrine's principles to make such decisions.

III. NEW YORK'S PUBLIC TRUST DOCTRINE JURISPRUDENCE

A. *Foundational Cases*

This section will examine the early New York jurisprudence on interpretation and application of the Public Trust Doctrine as evidenced by a number of cases decided in the mid-to-late 1800's.[109] In these cases, the issues related to ownership of the shorefront, the land under the shore, and fishing were primarily examined in the context of riparian rights or equitable estoppel rather than the Public Trust Doctrine.[110] The court appeared to avoid deciding these cases by express application of the Public Trust Doctrine.[111]

However, a close look at the wording of the decision in *Trustees of Brookhaven v. Strong*,[112] decided in 1875, reveals that the court partially recognized the primary principles of the Doctrine but ultimately elected to characterize them as "confused and antiquated customs, obsolete terms and distinctions, and conflicting opinions."[113] In *Strong*, the court apparently based its decision to allow the alienation of land under the sea for the purposes of oyster fishing on the principle of prescription.[114] However, the court also held that title to the lands under the water of bays and

---

108. *See supra* note 2.

109. *See, e.g.*, Trustees of Brookhaven v. Strong, 60 N.Y. 56, 66-67 (1875); *see also* Trustees of Brookhaven v. Smith, 23 N.E. 1002 (N.Y. 1890).

110. *See id.*

111. *See id.*

112. 60 N.Y. 56 (1875).

113. *Id.* at 66; *see also* discussion *infra* pp. 196-197.

114. *See id.* at 66-67.

harbors was "subject to the superior public right to use them for all navigable purposes . . . ."[115] The foregoing would appear to be an extremely narrow recognition of the first principle of the Public Trust Doctrine, namely that certain lands are owned in common by the public and subject to public rights of ingress and egress.[116] However, the court clearly did not recognize the second principle of the Doctrine as no mention was made that state control of the land under navigable waters takes the form of a trust, with the state as trustee for the public.[117] As a result of the court's recognition that land under navigable waters was subject to the public right of navigation, the court impliedly recognized that such land could not be alienated if to do so would materially prejudice the common right.[118] Yet, this part of the court's holding does not fully recognize the third principle of the Doctrine.[119] This principle establishes that the trustee may not dispose of public lands in a manner that substantially impairs the interests of the public.[120] The New York court apparently had no reservations with respect to alienation of trust lands as long as the municipality received compensation for such transfers.[121] Justifying alienation of trust land as not materially prejudicing the common right so long as consideration is received ignores the fact that beachfront is limited in supply, unique in character, and not replicable.[122] Such alienation directly conflicts with the intent of the Doctrine because the common right will always be materially prejudiced when invaluable and irreplaceable land is exchanged for mere monetary compensation.[123]

In *Trustees of Brookhaven v. Smith*,[124] decided in 1890, the New York court appeared to steer even further away from reliance on the Public Trust Doctrine as the court neither expressly applied the Doctrine nor anchored its decision in the Doctrine's principles.[125] In deciding an issue akin to determining the validity of title to trust land, the court found

115. *Id.* at 67.
116. *See id.* at 67; *see also* discussion *infra* pp. 200-201.
117. *See id. at* 63-73 (1875).
118. *See id.*
119. *See* discussion *infra* pp. 200-201.
120. *See* Trustees of Brookhaven v. Strong, 60 N.Y. at 63-73.
121. *See id.* 66-67.
122. *See* Welby, *supra* note 76, at 70.
123. *See* discussion *infra* pp. 185-187.
124. 23 N.E. 1002 (N.Y. 1890).
125. *See id.* at 1003.

no impediment to a municipality's alienating trust land to private ownership.[126] To the contrary, the court defended the private title held in undisputed possession for nearly 200 years against the municipality's attempt to assert ownership.[127] The court based its decision on a theory of equitable estoppel.[128]

It was not until the 1920's that the New York court appeared to finally recognize that the Public Trust Doctrine should be considered in issues pertaining to ownership of the foreshore and land under tidal waters.[129] In *Tiffany v. Town of Oyster Bay,*[130] the court addressed the issue of ownership rights of upland shore created by the filling in of the foreshore by a riparian owner.[131] In so doing, the court held that the answer required a consideration "(a) of the jus publicum, (b) the jus privatum, and (c) the right of ownership of the adjacent upland."[132] The court held that the law on the subject was not well defined and admitted that prior cases on similar issues had been decided based on "safe generalities."[133] However, the court declined the opportunity to be much more courageous than its predecessors and stopped short of delineating the major principles of the Doctrine. Instead, the court limited itself to an express recognition of the existence of the Doctrine, with a simultaneously broad and narrow interpretation of the right of public access.[134] The court held that the jus publicum included "the right of navigation, and when the tide is out, the right of access to the water for fishing, bathing and other lawful purposes to which the right of passage over the beach may be a necessary incident."[135] The court's recognition is broad in the respect that it included the right of access across the foreshore for bathing and other lawful purposes, and narrow in the respect that such a right to pass on

126. *See id.* at 1003.

127. *See id.* at 1004.

128. The general rule for equitable estoppel is that if one is induced to purchase land based on the acts or representations of another designed to influence his conduct, and which create a reasonable belief on his part under which he acts in the belief that he is acquiring good title, the party who has thus influenced the purchaser is estopped from setting up his own title against that of the purchaser. *See id.* at 1003.

129. *See* Tiffany v. Town of Oyster Bay, 136 N.E. 224, 225 (N.Y. 1922).

130. *See id.* at 225.

131. *See id.*

132. *Id.*

133. *Id.*

134. *See id.*

135. *Id.*

adjoining land was limited to the exposed land up to the high water mark and when the tide was out.[136]

The principle of the Doctrine directly implicated in *Tiffany*, that trust property cannot be alienated, was apparently neither recognized nor applied by the court.[137] Instead, the court arrived at a holding that preserved the status quo between private and public rights that preexisted the filling in of the foreshore. With respect to the inalienability of trust property, the court would go only as far as to state: "Doubtless, the town has large beneficial rights and privileges therein, but we should not undertake by premature assertion to decide their nature and extent in detail."[138] In expressing so crabbed an interpretation, the court was content to leave further development of the Doctrine to another time and place.

B. *Decisions Since 1970*

In 1971, in *Dolphin Lane Associates v. Town of Southampton*,[139] private property interests clashed with zoning ordinances enacted by a municipality favoring public access and use of waterfront property.[140] The court relied on the law of easements to insure public access to the waterfront.[141] However, the court also relied on the Public Trust Doctrine principle pertaining to alienation of trust lands to determine ownership of the land below the average high water line.[142]

In what had by now become common practice,[143] the New York Supreme Court, in *Dolphin Lane Associates*, once again avoided implicating the Public Trust Doctrine by name, preferring to describe it as a subject that has "been a prolific source of judicial discussion from the earliest times, and, judging from the numerous recent decisions, the subject is still as fresh as ever."[144] The court's inability to state the Doctrine's proper name was not its only oversight.[145] The court seemingly did not

136. *See id.*
137. *See id.* at 226.
138. *Id.*
139. 339 N.Y.S. 2d 966 (Sup. Ct. 1971).
140. *See id.* at 968.
141. *See id.* at 978.
142. *See id.* at 982, 985.
143. *See, e.g., Strong*, 60 N.Y. 56, *Smith*, 23 N.E. 1002, *Tiffany*, 136 N.E. 224.
144. *Dolphin Lane Assoc.*, 339 N.Y.S.2d 966, 981.
145. *See id.* at 978.

perceive the Doctrine as being applicable to the issue of public access to the waterfront and relied entirely on the fact that the conveyances in question expressly provided for an easement in favor of the public.[146] In what amounted to the narrowest recognition imaginable short of completely gutting the Doctrine, the court managed to find the Doctrine applicable to the issue of alienation of lands under water.[147] The court held that the issue of the ownership of such lands had long been settled as remaining in the sovereign for the benefit of the public.[148] Furthermore, the court held that a grant of title to land below the shoreline would clearly be invalid and illegal.[149] The holding also made absolutely clear that such limitations on a municipality's power to convey land fronting on navigable waters applied only to that land below the high water line.[150]

In *Gewirtz v. City of Long Beach*,[151] a decision reminiscent of its holding in *Dolphin Lane*,[152] the New York Supreme Court addressed the issue of a municipality's attempt to restrict use of a public park and beach.[153] The park and beach had been open to the public for thirty-four years before the municipality amended its code to limit access to residents only.[154] If ever there was a case that presented an issue based on facts that cried out for resolution based on the Public Trust Doctrine, this was it. Instead, the court elected to examine the issue based on "whether there has been a dedication by the city which precludes it from taking action limiting the use of the beach to residents . . ."[155] and in so doing, render a holding that can only be characterized as injurious to the Public Trust Doctrine. After meandering through the backwaters of the law of dedication,[156] the court declared that the municipality, by dedicating the property to use as a public park and beach by the "public at large for upwards of thirty years, put itself in a position of having to hold that prop-

146. *See id.*
147. *See id.* at 982.
148. *See id.*
149. *See id.*
150. *See id.* at 981.
151. 330 N.Y.S.2d 495 (Sup. Ct. 1972).
152. 339 N.Y.S.2d 966.
153. *See id.* at 500.
154. *See id.* at 500.
155. *Id.* at 504.
156. *See id.* at 504-08.

erty subject to a *public trust* for the benefit of the public at large."[157] Adding insult to injury, the court further enunciated that allowing the municipality to exclude the public access to a park and beach held in trust for the public would achieve a result "that violates the public trust principle since as to those who are excluded . . . [the] policy is as much a diversion of use as . . . if the municipality changed the use of the park or sold it."[158]

It is not until *Tucci v. Salzhauer*,[159] where the plaintiff made a claim under the "doctrine of jus publicum,"[160] that the court acknowledged the existence of the Public Trust Doctrine and applied one of the Doctrine's underlying principles to the issue in question.[161] In *Tucci*, the court was faced with the now familiar and still inevitable conflict between public and private ownership rights.[162] The plaintiff, a member of the beach-going public, sought to clear a path across waterfront property owned by a private party who opposed both the clearing and public access.[163] While the court addressed the issue of clearing and maintaining a pathway by holding that an easement existed,[164] it apparently relied solely on the Public Trust Doctrine, in name and principle, to address the issue of public access across privately owned property.[165] With respect to the rights of the public in the foreshore, the court held "that the Tiffany decision definitively established as the law of this state that the right of the public to use the foreshore when the tide is out, is limited to the right merely to pass over it as a means of access to the water . . . ."[166] The appellate court[167] slightly expanded the law of the state with respect to public use of the foreshore by holding that "when the tide is out, he may pass and repass over the foreshore as a means of access to reach the water for the same purposes and to lounge and recline thereon . . . ."[168]

---

157. *Id.* at 509 (emphasis added).
158. *Id.* at 512.
159. 329 N.Y.S.2d 825 (Sup. Ct. 1972).
160. *Id.* at 827.
161. *See id.* at 833-34.
162. *See id.* at 827.
163. *See id.*
164. *See id.* at 828-32.
165. *See id.* at 232.
166. *Id.* at 833.
167. *See Tucci*, 336 N.Y.S.2d 721.
168. *Id.* at 713.

However, the question remains whether the court in *Tucci* would have been so strong an advocate of the Public Trust Doctrine to support access across privately held waterfront property if a prior recorded easement, providing a right of way to the foreshore, had not existed.[169] Such advocacy becomes especially suspect in view of the court's minimal recognition and application of the Doctrine in past cases.[170] Furthermore, the court's interpretation of the public access principle of the Doctrine is extremely narrow.[171] Public access across land is limited to when the tide is out. When the tide is in, no accommodation is made to allow use of upland sand.[172] Finally, the court completely ignored the doctrinal principle pertaining to the inalienability of trust lands.[173] This principle bears directly on the issue of validity of title to such lands,[174] which in turn has a direct bearing on the need to rely on an easement to justify public access.[175]

Finally, in *Gladsky v. Glen Cove*,[176] the court confronted the issue of whether trust lands, specifically waterfront property, could be alienated.[177] The defendant municipality, apparently unaware of either the state's General City Law[178] or the Public Trust Doctrine, solicited offers for the sale of certain waterfront property.[179] The plaintiff-buyer's offer was accepted by the municipality, which subsequently learned that it was prohibited from conveying the property.[180] The plaintiff brought suit to compel specific performance by the municipality.[181] The court held the "resolution of the controversy turns on General City Law §20 (2),"[182] which statutorily restricted the municipality's power to convey such

169. *See Tucci*, 329 N.Y.S. 2d at 830.

170. *See, e.g., Dolphin Lane Assoc.*, 339 N.Y.S. 2d 966, *Gewirtz*, 330 N.Y.S.2d 495.

171. *See Tucci*, 336 N.Y.S.2d 721.

172. *See id.* at 723.

173. *See* discussion *infra* pp. 200-201 and note 2.

174. *See* discussion *infra* pp. 200-201 and note 2.

175. *See Tucci*, 336 N.Y.S.2d at 723.

176. 563 N.Y.S.2d 842 (App. Div. 1991).

177. *See id.* at 843.

178. *See* N.Y. GEN. CITY LAW §20 (2) (McKinney 1990).

179. *See Gladsky*, 563 N.Y.S.2d at 843.

180. *See id.* at 843-44.

181. *See id.*

182. *Id. at* 844

property by providing that "the rights to a city in and to its waterfront . . . land under water . . . are hereby declared to be inalienable."[183]

However, in *Gladsky*, the result really turned on the Public Trust Doctrine,[184] which formed the basis for the New York Legislature's enacting the statutory restriction in the first place.[185] The court there states: "the Legislature, cognizant of the well-settled common-law rule that a 'public trust' is impressed upon certain forms of publicly held property"[186] enacted the statutory restriction on alienation of trust land.[187] In view of this statement that the Public Trust Doctrine is settled common law, how is it that the court has continually avoided the issue of ascertaining the validity of title from past conveyances of trust land?[188] Did the court suddenly realize that the common law is well-settled or was it just too easy to apply the inalienability of trust land principle to this fact pattern? After all, in doing so, private property owners' settled interests weren't upset because the waterfront property in question was in the municipality's possession from the beginning.[189] Would this result have been different if the waterfront property was acquired by a private party prior to the New York Legislature's enactment, and a group of public citizens brought suit to have the title declared invalid based on the Doctrine's inalienability prong? With the tide of litigation rising,[190] it's only a matter of time before we find out how the court will rule on this issue.

IV. NEW JERSEY'S PUBLIC TRUST DOCTRINE JURISPRUDENCE

A. *Foundational Cases*

The case of *Arnold v. Mundy*[191] is generally regarded as the first case in the United States in which the court discussed the public trust.[192] The

183. *Id.*
184. *See id.*
185. *See id.*
186. *Id.*
187. *See id.*
188. *See, e.g., Strong*, 60 N.Y. 56, *Tucci*, 330 N.Y.S.2d 495.
189. *See Gladsky*, 563 N.Y.S.2d at 843.
190. *See* Kehoe, *supra* note 11, at 1915.
191. 6 N.J.L. 1 (1821).
192. *See* Lazarus, *supra* note 21, at 637 n28.

New Jersey court stated that "where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both water and the land under the water . . . are common to all people, and that each has a right to use them according to his pleasure . . . ."[193] It is in this 1821 case the court first mapped out the battle lines between the conflicting expectancy interests of private and public property ownership.[194] The court was keenly aware that it was treading on hallowed ground and that any decision that it might render in favor of one set of expectancy interests would come at the expense of the other.[195] In being forced to render a decision, the court lamented that doing so "might prove exceedingly injurious"[196] to one or both of these competing interests, and perhaps result in a "conflict for superiority"[197] that would "not only to disturb the peace of society but also . . . destroy the very subject matter of controversy."[198]

B. *Decisions Since 1970*

After a long period during which the strength of the Doctrine's protection of common rights was slowly eroded by decisional law that acceded those rights to legislative purpose and private property interests, the tide began to change.[199] The New Jersey court charted a new course, hoisted its main-sail, and got underway in terms of restoring the promise of the Doctrine as enunciated in *Arnold v. Mundy*.[200]

In *New Jersey Sports & Exposition Authority v. McCrane*,[201] the court began to reverse the tide of decisions eroding the vitality of the Doctrine and in the process, loosened the Doctrine from its traditional moorings of being primarily applicable to fishing and navigation.[202] In this case, the court faced the issue of whether the legislature could alien-

193. *Arnold*, 6 N.J.L. at 12.

194. *See id.* at 9.

195. *See id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See* Leonard J. Jaffe, *The Public Trust Doctrine Is Alive And Kicking In New Jersey Tidalwaters: Neptune City v. Avon-By-The-Sea - A Case Of Happy Atavism?*, 14 NAT. RESOURCES J. 309 (1971).

200. 6 N.J.L. 1 (1821).

201. 292 A.2d 545 (N.J. 1972).

202. *See id.* at 552.

ate trust lands to private parties for the construction of a sports complex for recreation and health, including bathing, boating and associated activities.[203] The majority opinion proclaimed that the operation and maintenance of a sports and exposition complex was a public project that served a public purpose.[204] The majority, in recognition of the Doctrine and its principle of inalienability of trust land,[205] held that the state's grant of permission to build the sports complex on tideflowed land did not violate the Doctrine.[206] The basis for this part of the court's holding was the fact that the state made no sale or transfer of title to the trust land in question.[207]

While the majority opinion in *New Jersey Sports & Exposition Authority* signaled a renewed recognition of the Doctrine,[208] it is the dissenting opinion that admitted the New Jersey Court's failure to adhere to the Doctrine in previous cases and proclaimed it time to revitalize and resurrect the Doctrine to preserve increasingly scarce water resources.[209] The dissent stated that it was

> "high time that the doctrine be reinvigorated and enforced to its full intent and purpose in the light of modern conditions, even though we may not be able to undo prior transgressions of it. Remaining tidal water resources. . .are becoming very scarce. . . demands upon them. . . much heavier, and their importance to the public welfare. . . much more apparent. We should safeguard the common right and interest in what is left."[210]

Yet, it is ironic that, at a time when the remaining tidal water resources still in the ownership of the state had become increasingly scarce,[211] the Doctrine resurfaced in a factual setting where it was used to

---

203. *See id.*
204. *See id.*
205. *See id.* at 560.
206. *See id.*
207. *See id.*
208. *See id.*
209. *See id.* at 573, 579 (Hall, J., concurring in part and dissenting in part).
210. *See id.* at 579.
211. *See id.*

justify the alienation of public trust lands for purposes deemed to be in the best interests of the public.[212]

In the wake of the *New Jersey Sports & Exposition Auth.* decision, the New Jersey court decided *Borough of Neptune City v. Borough of Avon-By-The-Sea.*[213] In *Avon*, the court addressed the question of whether an oceanfront community could charge non-residents higher fees than residents for use of the beach area.[214] In so doing, the court declined to decide the issue based upon a theory of discrimination.[215] Instead, the court elected to approach the case from a more fundamental viewpoint based upon an expanded application of the Public Trust Doctrine to include dry upland beach.[216] Clearly, inclusion of the dry upland beach as part of trust lands represented an expansion of the Doctrine's traditional coverage from "where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both water and the land under the water . . . ."[217] Expansion of the Doctrine's traditional scope to include dry upland shore allowed the court to address the issue of higher beach access fees for non-residents than for residents under the Doctrine's principle of public access to trust lands.[218] However, in deciding that the Doctrine's principle of public access to trust lands dictated that any state or municipal action that impaired equal access on equal terms is impermissible,[219] the court took advantage of this opportunity to speak about the Doctrine's other principle pertaining to improper alienation of trust lands and the consequences of such action to public accessibility to the beachfront.[220] The court stated in no uncertain terms that "control of the state for purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[221]

---

212. *See id.* at 560.
213. 294 A.2d 47 (N.J. 1972).
214. *See id.* at 48.
215. *See id.* at 51.
216. *See id.*
217. *See Arnold*, 6 N.J.L. at 12.
218. *See Borough of Neptune City*, 294 A.2d at 48.
219. *See id.* at 54.
220. *See id.*
221. *Id.*

In essence, the court's holding in *Avon*[222] salvaged from the depths, the public trust Doctrine's principle of inalienability of trust lands.[223] The holding signaled a 180 degree turn away from the broad statements made in the cases decided in the intervening years between *Arnold*[224] and *Avon,* where it was repeatedly held that the legislature had an unlimited power to convey trust lands to private parties.[225]

Of even greater significance is that, the court in *Avon* appears to have answered the question left unasked and unanswered by the court in *Exposition Authority.*[226] In *Exposition Authority*, the court relied on the Public Trust Doctrine to justify the alienation of public trust lands for purposes deemed to be in the best interest of the public[227] and, in so doing, noted that beachfront property available for public use had become scare in New Jersey.[228] Yet, New Jersey, a state with over 123 miles of coastline,[229] is generally regarded as the first state to have judicially recognized the scope and applicability of the Public Trust Doctrine.[230] Without question, all of New Jersey's coastline should comprise a significant part of the lands held in trust for the public use,[231] and for which the trustee (the state legislature) is expressly prohibited from making any "direct and absolute grant, divesting all the citizens of their common right."[232] So then how did beachfront property available for public use become so scarce in the state of New Jersey?

In answering this question, the court in *Avon*[233] begrudgingly admitted that some prior conveyances may have constituted an improper alienation of trust lands;[234] that such improper alienation may be subject to the right of public access to use the ocean waters;[235] and that such public

---

222. *See id.*
223. *See* discussion *infra* pp. 200-201 and note 2.
224. *See Arnold,* 6 N.J.L. 1.
225. *See* Jaffe, *supra* note 202.
226. *See New Jersey Sports & Exposition Auth.*, 292 A.2d 545.
227. *See id.* at 560.
228. *See id.* at 579.
229. *See Welby, supra* note 76, at 70 n. 4.
230. *See Arnold,* 6 N.J.L. at 1.
231. *See* discussion *infra* pp. 200-201 and note 2.
232. *See Arnold,* 6 N.J.L. at 1.
233. *See Borough of Neptune City*, 294 A.2d 47.
234. *See id.* at 54.
235. *See id.*

access over privately held lands is problematic.[236] However, as part of its exploration of this difficult question, the court also dredged up long submerged issues of even greater difficulty, namely the validity of private title to public trust lands, and the public's right of access too current trust lands and waters across former trust lands now in the possession of private parties.[237] Sadly, the court's willingness to bring this difficult issue to the surface and expose it to the light of judicial scrutiny becomes little more than a lament over past improper legislative action to alienate trust lands.[238] With no discussion whatsoever of the judiciary's repeated acquiescence to or participation in such indiscretions,[239] and with apparently little to offer in the way of a solution,[240] the court hid behind the judicial practice of determining that the case at hand does not require resolution of such issues and declined to express an opinion.[241] The issues of the validity of private title to trust lands and public access over that privately owned land, formerly owned by the trust and improperly alienated by the state, are left to sink back into the dark and murky depths.

Following some distance astern of *Avon*[242] came *Van Ness v. Borough of Deal.*[243] In *Deal,* the court continued to nourish the Doctrine by holding that the fact that a municipality never dedicated its beach for general use, in no way excluded the beach from being subject to the Public Trust Doctrine.[244] The court held that the public had the right to use and enjoy the beach and that the municipality could not limit public access rights "which, under the Doctrine, the public inherently has in full."[245] However, the court also held that the Doctrine did not apply to public access to a municipal beach club facility, access to which could be regulated under the concept of municipal power as long as the limiting classifications were reasonable under the circumstances.[246]

---

236. *See id.*
237. *See id.*
238. *See id.*
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.* at 296.
243. 393 A.2d 571 (N.J. 1978).
244. *See id.* at 573-74.
245. *Id.* at 574.
246. *See id.* at 572.

In *Deal,* as in *Avon,*[247] the court recognized that the validity of private title to public trust lands was at issue.[248] However, the court described the issue as merely "troublesome,"[249] and took shelter behind the judicial practice of determining that this immensely important question "is not involved in the present case and we leave a more definite resolution of it to specific facts and circumstances where it can be dealt with directly."[250] Thus, even as the court continued to strengthen and expand the applicability of the Doctrine to the remaining beachfront property owned by the state and municipalities, it refused to address the applicability of the Doctrine to public access over privately held trust land and the validity of the titles to those lands.

Maintaining the course and speed established in *Deal,*[251] the court in *Hyland v. Borough of Allenhurst,*[252] declined the opportunity to apply the Public Trust Doctrine to the issue of public access to municipal facilities.[253] Rather, the court decided the case under the concept of municipal power.[254] However, the court used the Doctrine to mandate equal public access to public trust lands and dedicate upland beach area for public use on a nondiscriminatory basis.[255] In *Hyland,* the court expressly held that "the general public is entitled to access to both the public trust lands along the Allenhurst shoreline and to all portions of the dedicated beach area . . . for a fee no greater than that charged residents for similar use."[256] In addressing the issue of municipally owned facilities, the court declined to expand the scope of the Doctrine and issued a crabbed interpretation of the Doctrine's intent that found it to apply only to natural resources and not to man-made structures.[257] Further, the court held that the Doctrine did not require municipalities to encourage use of public trust lands but rather, it required the municipality to do nothing that inter-

247. *See Borough of Neptune City,* 294 A.2d 47.
248. *See Van Ness,* 393 A.2d at 574.
249. *See id.* at 574.
250. *Id.*
251. *See id.* at 175.
252. 372 A.2d 1133 (N.J. Super. Ct. App. Div. 1977).
253. *See id.* at 1136.
254. *See id.*
255. *See id.* at 1135.
256. *Id.*
257. *See id.* at 1137.

feres with public access to those lands.[258] By so holding, the court again endorsed the Doctrine's broad principle of insuring public accessibility to trust lands but drew a line in the sand with regard to expanding the applicability of the Doctrine beyond that point.[259] The court did not address the Doctrine's principle that trust land is inalienable.[260] Nor did the court address the corollary issues of public access over privately held trust land and the validity of the private title to public trust lands.[261]

The inevitable conflict between private and public property rights surfaced again in *Lusardi v. Curtis Point Property Owners Ass'n.*[262] The court decided the validity of a municipal zoning ordinance that prohibited recreational use of privately-owned, unimproved oceanfront in a community whose waterfront was exclusively zoned for single-family residential use only.[263] The private property owners were concerned that their quiet residential neighborhood would be disrupted by large crowds utilizing the beach.[264] The court held that the zoning ordinance limiting the use of the beach conflicted with the state's policy of encouraging and protecting public access to, and recreational use of, the beachfront.[265] However, in reaching this decision, the court held that the Public Trust Doctrine was not directly implicated as the case concerned the exercise of zoning power by a municipality.[266]

The *Lusardi* court's position is unfathomable. The opinion is replete with references to permit greater public access to oceans and beaches and common ownership of the waterfront by the citizens of the state.[267] Furthermore, the court invalidated the ordinance because it conflicted with the two statutes:[268] the Beaches and Harbors Bond Act of 1977,[269] a statutory expression similar to the Public Trust Doctrine, and the Coastal

258. *See id.*
259. *See id.*
260. *See* discussion *supra* pp. 200-201 and note 2.
261. *See* discussion *infra* pp. 215-217.
262. 430 A.2d 881 (N.J. 1981).
263. *See id.* at 883.
264. *See id.* at 884.
265. *See id.* at 887-88.
266. *See id.* at 886.
267. *See id.* at 884-87.
268. *See id.* at 887.
269. *See id.*

Area Facility Review Act,[270] a regulation that gave priority to waterfront development that served a greater rather than a lesser number of people.[271] By stating that the Public Trust Doctrine was not directly implicated, which it clearly was, the court once again was able to skirt around the issue of public access over privately held trust land.[272] Instead it addressed only quasi-public access to undeveloped waterfront property, such access being consented to by the property owners.[273] This supposedly indirect implication of the Doctrine also allowed the court to ignore the issue of the validity of private title to trust lands.[274] To the contrary, the court apparently had no problem with the ordinance that zoned the entire waterfront of the municipality for private residential development.[275]

It was not until 160 years after *Arnold*[276] effectively mapped out the battle lines between the conflicting expectancy interests of private and public property ownership by holding that "where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both water and the land under the water . . . are common to all people and that each has a right to use them according to his pleasure. . .,"[277] that the New Jersey court appeared ready to finally decide the issue of public access across privately held trust lands. In *Matthews v. Bay Head Improvement Ass'n*,[278] the New Jersey court handed down what has been proclaimed as a landmark decision[279] that increased public access to the beach. The court held that under the Public Trust Doctrine, the public has the right to both access and use of "privately-owned dry sand areas as reasonably necessary"[280] for access to the foreshore and recreation on the dry sand.[281] Could it be that after so long a period of disregard and neglect,

---

270. *See id.*

271. *See id.*

272. *See id.*

273. *See id.*

274. *See* discussion *supra* pp. 30-32.

275. *See* Lusardi v. Curtis Point Prop. Owners Ass'n., 430 A.2d 881, 883 (N.J. 1981).

276. *See Arnold*, at 6 N.J.L 1.

277. *See supra* note 197.

278. 471 A.2d 355 (N.J. 1984).

279. Kehoe, *supra* note 11, at 1915.

280. *See Mathews*, 471 A.2d at 365.

281. *See id* at 366.

that the public, and the Doctrine would finally receive their full entitlement? Were advocates of public access to the beachfront, who for years fought their battle against municipal and privately-held trust lands, finally victorious? Was this decision too good to be true? Well, as the commonly held saying goes, "if something appears too good to be true, that's because it probably is." The victory was a Pyrrhic one. In fact, it may have been no victory at all.

The first problem with this transparent victory is that the court, in announcing this new-found right of passage across "privately-owned dry sand areas,"[282] apparently had no problem with the conflict that exists in characterizing inalienable trust lands as "privately-held."[283] It can be surmised that either the court relied upon an unannounced holding affirmatively establishing the validity of title to privately-held trust lands, or the court overlooked the fact that it had steadfastly charted a course away from addressing that threshold issue.[284]

The second problem is that this new found right of passage is not as sweeping as it appears to be on its surface. The right to pass is inexplicably limited to crossing over "dry sand areas as reasonably necessary."[285] The court made no mention whatsoever about any right to cross privately-held trust land that fronts on tidal waters where no dry sand area exists (i.e., private properties with bulkheads and or piers that extend seaward of the mean high tide mark).[286] Further, the reasonably necessary standard established by *Mathews*[287] is one that must be applied to the facts of each case and portends somewhat consistent results at best and at worst, no consistency at all.

Finally, no sooner did the court announce a sweeping right of public access to, and use of, privately-owned trust land than it began to qualify that right and ultimately withdraw it completely.[288] The court first held that "recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as rea-

---

282. *Id.* at 365.

283. *Id.*

284. *See, e.g., Borough of Neptune City*, 294 A.2d 47.

285. *See Mathews*, 471 A.2d at 366.

286. *See id.*

287. *See id.*

288. *See id.* at 369.

sonably necessary."[289] Then the court, in response to the Public Advocate's urging that all privately-owned beachfront property be opened to the public,[290] held "nothing has been developed on this record to justify that conclusion."[291] In a final pronouncement that takes the supposed landmark decision[292] and buries it beneath the sand, the court said "[a]ll we decide here is that private land is not immune from a *possible* right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming."[293] In conclusion, the court meekly added "[w]e realize that considerable uncertainty will continue to surround the question of the public's right to cross private land . . . [w]here the parties are unable to agree . . . the claim of the private owner shall be honored until the contrary is established."[294]

In view of the foregoing, it is apparent that far from granting to the public the full measure of rights inherent under the Public Trust Doctrine,[295] the court affirmatively reduced those rights.[296] The court in *Matthews,* by establishing a presumption in favor of the private owner of supposedly inalienable trust lands, and by requiring that a public party looking to assert its rights under the Doctrine must litigate to do so,[297] did indeed render a landmark decision. However, it is one upon which the Public Trust Doctrine has run aground.

V. CONCLUSION

A. *New York*

It is as inaccurate to conclude that New York jurisprudence fully recognizes the Public Trust Doctrine as it is to conclude that New York

289. *Id.* at 365
290. *See id.* at 369.
291. *Id.*
292. *See* Kehoe, *supra* note 11, at 1915.
293. *See Matthews,* 471 A.2d at 369 (emphasis added).
294. *Id.* at 370
295. *See* discussion *infra* pp. 189-192, 200-201.
296. *See Mathews,* 471 A.2d at 369.
297. *See id.*

jurisprudence barely recognizes the Doctrine at all.[298] The New York court has not held a steady course in arriving at its current point of recognition of the Doctrine.[299] The court's heading has varied considerably from no recognition[300] to full recognition,[301] and numerous positions in between.[302] Perhaps the only familiar landmark discernable in the court's foggy Public Trust Doctrine jurisprudence is a reluctance to recognize and apply fully, the terminology and principles of the Doctrine.[303]

While New York has recognized the first principle of the Doctrine, namely, that public trust lands are subject to public rights of ingress and egress,[304] the court has been unable to propose a workable solution to the dilemma of public access across privately held waterfront property in order to gain access to trust lands.[305] Furthermore, the court's crabbed interpretation of what constitutes waterfront trust land for purposes of gaining such access is limited to land seaward of the high tide mark, when the tide is low.[306] Apparently, the court recognizes no right to cross privately held land when the tide is high.[307]

New York has also recognized the second principle of the Doctrine, namely, that the form of such common ownership has been established as a trust between the state and its citizens.[308] However, such recognition has failed to include holding the state government to the traditionally high standard of duty that governs a trustee's conduct.[309] To the contrary, the court has defended the trustee's apparent breach of its fiduciary duty, preferring instead to water down the trustee's responsibilities to the public under the Doctrine.[310] For the most part, the court has repeatedly

298. *See, e.g., Gewirtz*, 330 N.Y.S.2d 495;*Gladsky*, 563 N.Y.S.2d 842.

299. *See, e.g., Gewirtz*, 330 N.Y.S.2d 495; *Gladsky*, 563 N.Y.S.2d 842, *Strong*, 60 N.Y. 56; *Smith*, 118 N.Y. 634; *Tiffany*, 234 N.Y. 15.

300. *See, e.g., Gewirtz*, 330 N.Y.S.2d 495.

301. *See, e.g., Gladsky*,563 N.Y.S.2d 842.

302. *See, e.g., Strong*, 60 N.Y. 56;*Tiffany*, 136 N.E. 224; *Dolphin Lane Assoc.*, 339 N.Y.S.2d 966.

303. *See, e.g., Strong*, 60 N.Y. 56; *Smith*, 23 N.E. 1002; *Tiffany*, 136 N.E. 224; *Dolphin Lane Assoc.*, 339 N.Y.S.2d 966 ; *Tucci*, 329 N.Y.S. 2d 825.

304. *See supra* note 2.

305. *See, e.g., Tiffany*, 136 N.E. 224; *Tucci*, 329 N.Y.S. 2d 825.

306. *See Id.*

307. *See Id.*

308. *See supra* note 2.

309. *See, e.g., Strong*, 60 N.Y. 56; *Dolphin Lane Assoc.*, 339 N.Y.S.2d 966.

310. *See Id.*

given a wide berth to the issue of trustee breach of duty, and has at times sailed right past the issue, even where the facts of a case make the issue self-evident.[311]

It is with respect to the third principle of the Doctrine, namely, that the state not dispose of public lands in a manner that substantially impairs the interests of the public,[312] that the New York court has most consistently failed to recognize and apply the Doctrine.[313] In a state that has proclaimed the Public Trust Doctrine as "well-settled common-law . . . .,"[314] the question that looms in front of the court like an enormous iceberg is: If the state cannot dispose of public lands in a manner that substantially impairs the interests of the public, then how did so much waterfront trust land become alienated from the trust and conveyed into private residential ownership? Despite the enormity of this issue, the court has consistently failed to either perceive or acknowledge its presence.[315]

It is not until 1991 that the court's decisional law evidences the recognition of the principle of inalienability of trust lands.[316] But sadly for the Public Trust Doctrine and the beach going public, the victory not only comes late in the day, but it is shallow as well. The court's long overdue recognition actually turned on a statutory embodiment of the Doctrine, and was applied in a case where the land in question was in the possession of a municipality, not private interests.[317] The issue of the validity of past conveyances of trust land to private ownership in a manner that substantially impaired the interests of the public, remains for now, adrift.

---

311. *See Id.*

312. *See supra* note 2.

313. *See, e.g., Strong*, 60 N.Y. 56, *Smith*, 23 N.E. 1002; *Tiffany*, 136 N.E. 224; *Dolphin Lane Assoc.*, 339 N.Y.S.2d 966 ; *Tucci*, 329 N.Y.S.2d 825.

314. *See Gladsky*, 563 N.Y.S.2d 842, 844 .

315. *See, e.g., Smith*, 23 N.E. 1002; *Tiffany* , 136 N.E. 224; *Dolphin Lane Assoc.*, 339 N.Y.S.2d 966; *Gewirtz*, 330 N.Y.S.2d 495; *Tucci*, 329 N.Y.S.2d 825.

316. *See Gladsky*, 563 N.Y.S. 2d at 844.

317. *See id.*

B. *New Jersey*

Despite its self-proclaimed role as savior of the Public Trust Doctrine,[318] New Jersey's jurisprudence has neither fully recognized nor applied the Doctrine's principles.[319] On the surface, New Jersey's decisional law is so replete with the terminology of the Doctrine, that it appears that the New Jersey Court held a steady bearing and seldom lost sight of the Doctrine's guiding principles.[320] However, diving beneath the court's facility with use of the Doctrine's terms, the decisional law reveals a failure to stay the course and fully and consistently apply the Doctrine's underlying principles.

New Jersey decisional law has recognized the first principle of the Doctrine, namely, that public trust lands are subject to public rights of ingress and egress.[321] However, the court has been unable to propose a workable solution to the dilemma of public access across privately held waterfront property in order to gain access to trust lands.[322] More recently, the court purported to pioneer an expansion of the definition of beachfront trust property accessible by the public that promised to resolve this issue in favor of the public interests.[323]

However, on closer examination, the court's expansion of the public right of access more resembled robbery on the high seas. Not only did the court fail to expand the public right of access to privately held waterfront property,[324] but in those instances where public and private interests clash, the court has established a presumption *in favor of private property interests*.[325]

New Jersey has also recognized the second principle of the Doctrine, namely, that the form of such common ownership has been established as

---

318. *See New Jersey Sports & Exposition Auth. v. McCrane*, 292 A.2d 545, 580 (N.J. 1972) (Hall, J., concurring in part and dissenting in part.)

319. *See, e.g., Hyland*, 372 A.2d 1133; *Lusardi*, 430 A.2d 881.

320. *See, e.g., Arnold*, 6 N.J.L. 1; *New Jersey Sports & Exposition Auth.*, 292 A.2d 545; *Borough of Neptune City*, 294 A.2d 47; Van Ness v. Borough of Deal, 393 A.2d 825 (N.J. 1978).

321. *See* sources cited *supra* note 2.

322. *See, e.g., Van Ness*, 393 A.2d 571); *Hyland*, 372 A.2d 1133; *Lusardi*, 430 A.2d 881.

323. *See Matthews*, 471 A.2d 355.

324. *See id.* at 369-70.

325. *See id.*

a trust between the state and its citizens,[326] but apparently only with respect to such lands that are currently held in governmental possession.[327] The court has seemingly refused to acknowledge any failure on the part of the state government in its role of trustee despite that as of 1977, 27% of New Jersey's coastline was privately owned, and that private ownership is expected to increase dramatically by the year 2000.[328]

With respect to the third principle of the Doctrine, namely, that the state not dispose of public lands in a manner that substantially impairs the interests of the public, [329] New Jersey early on recognized the principle of inalienability of trust lands, but again the courts have apparently limited its application to only those beaches that have been traditionally utilized by the public.[330] The court has steadfastly refused to apply the inalienability of trust land principle to what clearly were conveyances of trust lands in a manner that substantially impaired the interests of the public.[331] The New Jersey Supreme Court has, as yet, been unable to propose a solution to the dilemma of public access being limited to ever decreasing public and quasi-public beaches as a result of continued privatization of the waterfront.[332]

VI. SUGGESTIONS FOR IMPROVEMENT

A. *Renewed Role For The Courts*

Courts operate with an extraordinary degree of freedom.[333] Their view about the propriety of any issue that comes within their purview significantly determines the procedural devices that will be employed to address the issue at hand.[334] Courts rarely rule that a policy is illegal be-

---

326. *See* sources cited *supra,* note 2.

327. *See, e.g., New Jersey Sports & Exposition Auth.*, 292 A.2d 545; *Borough of Neptune City*, 294 A.2d 47; *Matthews*, 471 A.2d 355.

328. *See* Kehoe, *supra* note 11, at 1913.

329. *See* discussion *infra* pp. 15-16 and note 2.

330. *See, e.g., Borough of Neptune City*, 294 A.2d at 296, *Lusardi*, 430 A.2d at 881, *Matthews*, 471 A.2d at 355.

331. *See id.*

332. *See id.*

333. *See* Sax, *supra* note 1, at 558.

334. *See id.*

cause it is unwise.[335] Rather, courts generally choose to operate in a more sophisticated and restrained realm whereby they can either require the appropriate agency to provide additional justification for a questionable policy or remand the policy for additional consideration by the legislature.[336] In this manner, courts can either aid the underrepresented and politically weak or place final authority over the matter into the hands of the appropriate agency.[337]

Governmental agencies that are responsible for performing their function over a large, diverse geographic area, rather than within the confines of a particular community, are rarely subject to attack by the public, whom they supposedly serve.[338] Any administrative process that calls for public hearings on proposed agency action is, by and large, predetermined and therefore, inadequately representative of the geographic area's diffuse constituency.[339] This suggests that the proper role for the courts is not to legislate from the bench, but rather to require other administrative agencies or the legislature to make an express, public policy decision on the matter in question.[340]

The problem that the court faced in the public resource arena and in applying the Public Trust Doctrine is that the diffuse majority (e.g., the public) is frequently made subject to the will of a concentrated, self-interested minority (e.g., private property owners).[341] Often, such powerful minorities are able to have legislative and administrative bodies focus on their self-interests to the exclusion of broad public interests.[342] Therefore, it is incumbent upon the courts, in matters pertaining to public trust property and resource allocation, to promote and insure the equality of political power between the disorganized and diffuse majority and the organized and concentrated minority.[343] The courts can best fulfill this function by remanding appropriate public trust resource cases to the legislature after public interests have been aroused.[344]

---

335. *See id.*
336. *See id.*
337. *See id.*
338. *See id.*
339. *See* Sax, *supra* note 1, at 558.
340. *See id.* at 559.
341. *See id.* at 560.
342. *See id.*
343. *See id.*
344. *See id.*

The courts could identify appropriate cases by keeping a lookout for those situations in which a political imbalance exists.[345] Political imbalances are sure to be discovered whenever a claim is made on behalf of diffuse public resource uses.[346] It is in such cases that diffuse public interests will surely face difficulty in organizing and financing to effectively deal with administrative and legislative agencies.[347] There, the courts should withdraw the usual presumption that the established administrative or legislative process has adequately considered and resolved all of the relevant issues.[348] In effect, the courts must accept jurisdiction over the matter.[349] The next step is to scrutinize each such case for any indication that the issue has not been properly dealt with by the administrative agency or legislature.[350] To aid in this most difficult part of the process, courts have developed four guidelines:[351]

1. Has title to public trust property been conveyed at less than fair market value under circumstances where there is no very obvious reason for such a subsidy?[352]

2. Has the government granted the authority to a private interest to make public trust resource use decisions which may subordinate broad public rights to private interests?[353]

3. Has there been an attempt to reallocate public trust use rights to private interests or to narrowly redefine public use rights?[354]

4. Is the resource in question being used for its natural purpose (e.g., is the beachfront being used as a beach)?[355]

---

345. *See* Sax, *supra* note 1, at 561.
346. *See id.*
347. *See id.*
348. *See id.*
349. *See id.*
350. *See* Sax, *supra* note 1, at 562.
351. *See id.*
352. *See id.*
353. *See id.*
354. *See id.* at 563.
355. *See id.* at 565.

A court's steadfast application of these guidelines would allow it to maintain a steady bearing and ensure: 1) that administrative and legislative decisions affecting public trust property would be subject to careful scrutiny and require substantial supporting evidence;[356] 2) that claims advocating private property rights to be superior to public trust use rights would be denied unless they are consistent with a general public plan regulating the resource in question;[357] 3) that acts that infringe upon public trust uses are presumed to have been made without adequate representation of the diffuse public interest and, accordingly, must be sent back for reaffirmation or more explicit justification;[358] and 4) that public trust resources have their broadest benefits to the public when they are left in their natural state.[359]

The heading that a court should take with respect to application of Public Trust Doctrine principles[360] to justify public access to trust property, will depend on a number of factors.[361] First, courts will be guided by their views on whether, and to what degree, it is appropriate for the judiciary to effect change generally considered the province of the legislature.[362] Second, the degree to which courts link the Public Trust Doctrine to the right of access to trust property[363] will be strongly influenced by the rapidly approaching crisis in the availability of beaches that are open to the public.[364] Third, the Doctrine will continue to evolve with the needs of society.[365] Finally, the degree to which state legislatures pass legislation that codifies the principles of the Doctrine[366] could potentially have the greatest influence on the court.[367] This potentially great influ-

---

356. *See* Sax, *supra* note 1, at 563.

357. *See id.* at 563.

358. *See id.*

359. *See id.* at 565.

360. *See* discussion *infra* pp. 15-16 and note 2.

361. *See* JACK H. ARCHER ET AL, THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS, 99, 106 (1994).

362. *See id.*

363. *See id.*

364. *See* David C. Slade, *Putting The Public Trust Doctrine To Work*, National Project On The Public Trust Doctrine, 337 (Nov. 1990).

365. *See* ARCHER, *supra* note 368, at 106.

366. *See* discussion *infra* pp. 15-16 and note 2.

367. *See* ARCHER, *supra* note 368, at 106.

ence of legislative recognition of the Public Trust Doctrine is the topic we will examine next.

B. *A Renewed Role For The Legislature*

Recognition of the Public Trust Doctrine by state courts alone will not provide for full use of the Doctrine.[368] In order to better coordinate and balance the development and preservation of coastal resources, the Doctrine must be salvaged from the depths of the common law and recognized by state statutory and regulatory law.[369]

Before a state administrative agency can implement the Doctrine, it must be lawfully authorized to do so.[370] Were the legislature to statutorily recognize the Doctrine, each administrative agency with authority over and responsibility for public trust resources would have to review its mission and chart a new statutory and regulatory course.[371]

It is imperative that any statutory recognition of the Doctrine also expressly forbid the state from authorizing private use of trust property where such use would unduly interfere with public trust rights.[372] Additionally, no private use of public trust property should be unconditionally irrevocable.[373] Once made part of the statutory scheme, states could make more effective use of the Doctrine by establishing a comprehensive area-wide management plan.[374]

Once authorized by statute, a comprehensive area-wide management plan would include management of the coastal zone and its resources, including public trust resources.[375] Traditionally, states have predominately managed coastal zone resources using their police powers.[376] However, the overlap of coastal zone resources and public trust resources allows states opting for a comprehensive area-wide management plan to anchor their management program in public trust principles[377] and the

368. *See* Slade, *supra* note 371, at 337.
369. *See id.*
370. *See id.*
371. *See id.*
372. *See* Slade, *supra* note 371, at 249.
373. *See id.*
374. *See* Archer, *supra* note 368.
375. *See id.* at 100.
376. *See id.*
377. *See* discussion *infra* pp. 15-16 and note 2.

states' police power.[378] The advantages of such an approach are obvious: from public trust principles[379] the state obtains legal support for prioritizing and prohibiting uses within the public trust/coastal zone and a defense to claims of regulatory taking, while retaining the police power defense for its management decisions.[380] A comprehensive area-wide plan would include prioritizing competing public trust uses, including specifying certain uses as prohibited, and addressing the serious problems associated with the cumulative effects of unrelated coastal development projects.[381]

The Public Trust Doctrine, because of its very nature as a trust, justifies prioritizing and distinguishing between permissible and impermissible uses of trust lands,[382] and with little risk of successful regulatory takings claims.[383] Once established, this prioritization can be recognized by the legislature and codified in state law.[384] Prioritizing competing public trust uses, including prohibiting those uses considered impermissible, would become part of a comprehensive area management plan.[385] The Doctrine has, at different times, permitted different use priorities.[386] Where once the Doctrine recognized that navigation was a priority over other uses of public trust lands, that is no longer the case.[387] This inherent flexibility of the Doctrine, at times the basis for claims of structural deficiency,[388] would permit states to alter the balance of uses at different times based on changing social values.[389]

Finally, statutory incorporation of Public Trust Doctrine principles[390] into a comprehensive area-wide plan would allow state trustees to establish limits on the cumulative effects of individual projects that affect trust

---

378. *See* ARCHER, *supra* note 368, at 100.
379. *See* discussion *supra* pp. 15-16 and note 2.
380. *See* ARCHER, *supra* note 345, at 100.
381. *See id.*
382. *See id.*
383. *See id.*
384. *See id.* at 99.
385. *See id.* at 101.
386. *See id.*
387. *See id.*
388. *See id.*
389. *See id.*
390. *See* ARCHER, *supra* note 368, at 102.

resources and uses.[391] The state trustee, acting on its obligation to preserve trust property, could limit new trust uses which are harmful to trust property or unduly infringe on established trust uses on the theory that they harm the public interest.[392] Similarly, states could decide to limit development of waterfront property because it threatens the public interest.[393] Of even greater importance, states could limit individual uses or projects not harmful in and of themselves because of their cumulative effects on trust property and resources.[394] The state trustee would be able to justify this limitation on the ground that no trust use may be permitted without adequate consideration of its effect on trust property and established trust uses.[395] Challenges by those parties affected by such limitations based on a claim of regulatory taking would not prevail against a properly applied and articulated Public Trust Doctrine.[396]

During the coming decade, the tide of people coming to the shore promises to increase.[397] This increase will only exacerbate the already great strain on New York and New Jersey's access problems.[398] Any policy of providing greater access to the beachfront runs aground on the fact that a substantial portion of the beachfront is in the hands of private title holders.[399] Many states, New York and New Jersey included, have yet to utilize the Public Trust Doctrine on a widespread basis.[400] Notifying landowners that they no longer have their traditional control and exclusive title to the land that they own, land that may have been purchased long ago and at great expense, is a titanic issue.[401] Nevertheless, circumstances are becoming such that the issue will have to be dealt with. The Public Trust Doctrine, in equilibrium with and/or incorporated as part of a statutory scheme, is a feasible and efficient option to deal with this issue.[402]

---

391. *See id.*
392. *See id.*
393. *See id.*
394. *See id.*
395. *See id.*
396. *See id.*
397. *See* Summerlin, *supra* note 14, at 444.
398. *See id.*
399. *See* Welby, *supra* note 76, at 89.
400. *See* Summerlin, *supra* note 14, at 444.
401. *See id.*
402. *See id.*

Whether invoked by the courts and/or the legislature, the Public Trust Doctrine, because of its anchorage in ancient history, its epic journey of survival to modern times, and its most noble and majestic purpose to protect and preserve the most sacred and invaluable of all natural resources for the benefit of the common people, will have an indispensable role to play in future resource controversies.

Frank Langella